No. 84-1070

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LARRY WITTERS,

Petitioner,

—v.—

STATE OF WASHINGTON
DEPARTMENT OF SERVICES FOR THE BLIND,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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QUESTIONS PRESENTED

1. Whether this case should be remanded for a decision on state constitutional grounds.

2. Whether the denial of government financial assistance to a person studying for the ministry is compelled by the Establishment Clause of the First Amendment.

3. Whether the State violates petitioner's right to free excercise of religion by refusing to pay for his religious training.

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INTERESTS OF AMICI*

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members dedicated to the protection of civil rights and civil liberties. The American Civil Liberties Union of Washington is one of the state affiliates of the ACLU.

The ACLU and its affiliates are committed to the principles of separation of church and state and the free exercise of religion. Amici believe the values underlying the Religion Clauses are best served when government maintains a position of neutrality with respect to religion, avoiding both preference for and discrimination against religion, while respecting the free exercise of religion.

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* The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court.

The ACLU and its affiliates have frequently participated in litigation involving public financial assistance to religion in order to preserve the principle of church-state separation, which is one of this nation's most significant contributions to contemporary civilization.

STATEMENT OF THE CASE

Petitioner Witters seeks review of the decision in Witters v. State Commission for the Blind, 102 Wash.2d 625, 689 P.2d 53 (1984); Appendix to the Petition for Certiorari ("Pet. App.") at A-1. The Washington Supreme Court there affirmed the decision of the Washington State Commission for the Blind ("Commission") to deny petitioner's request for financial vocational assistance because he was "studying to be a pastor, missionary, or church youth

director." 689 P.2d at 55. The court concluded that to provide financial assistance in such circumstances would violate the Establishment Clause of the United States Constitution, as well as the stricter church/state separation provisions of the State Constitution.

Witters was enrolled at the Inland Empire School of The Bible. Inland is a private institution, providing a "non-denominational" Christian education. Witters was pursuing, at first, a three year Bible diploma course which he then expanded to a four year Biblical Studies degree course. That course of study included classes in the Old and New Testaments, ethics and church administration. (See Washington Superior Court Findings of Fact and Conclusious of Law; Pet. App. at C-1 et seq.).

Witters, who is legally blind, sought financial aid pursuant to Wash. Rev. Code

§74.16.181, which empowers the Commssion to maintain programs to assist visually handicapped persons, including a program of financial vocational assistance. The Commission has established such a program, funded approximately 80 percent by federal funds and the remainder by state funds.

Although the enabling statute, Wash. Rev. Code §74.16.181, does not expressly contain an exception for persons studying for the ministry, the Commission denied Witters financial benefits because of its own policy prohibiting use of public funds to assist an individual in the pursuit of a religious

career or degree.[1] The Commission was expressly empowered to make such regulations. Superior Court Conclusions of Law, Nos. 2 and 5, citing Wash. Rev. Code §74.16.450, Pet. App. at C-5 and 6. And such regulations were "applied and enforced uniformly." Id. at C-6.

SUMMARY OF ARGUMENT

The Religion Clauses of the First Amendment must mean at least this: that the government cannot pay for the religious schooling of the clergy. The involvement of

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[1] The Commission's policy provides as follows:

> "Private institutior or out-of-state institution.. The Washington State Constitution forbids the use of public funds to assist an individual in pursuit of a career or degree in theology or related areas."

Pet. App. at C-4.

the state in that most intimately sectarian enterprise would be inconsistent with the historical foundations of religious liberty in this country, as well as all of this Court's Religion Clause jurisprudence.

This case presents an unusual fact pattern in Establishment Clause litigation, because it deals with a state's denial of benefits to an individual seeking to use those benefits for a religious prupose. In previous cases, the Court has been asked to define the restraints imposed by the Establishment Clause on government attempts to channel public resources to support

religious education.[2] Nonetheless, traditional and well-established First Amendment principles must be utilized to resolve petitioner's claim.

In this case, to permit the government funding sought by the petitioner would be a direct and substantial aid to religion, of just the sort this Court has repeatedly held violates the Establishment Clause. And to

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[2] See e.g., Everson v. Board of Education, 330 U.S. 1 (1947); Board of Education v. Allen, 392 U.S. 236 (1968); Lemon v. Kurtzman, 403 U.S. 602 (1971); Tilton v. Richardson. 403 U.S. 672 (1971); Hunt v. McNair, 413 U.S. 734 (1973); Levitt v. Committee for Public Education, 413 U.S. 472 (1973); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973); Wheeler v. Barrera, 417 U.S. 402 (1974); Meek v. Pittenger, 421 U.S. 349 (1975); Roemer v. Board of Public Works, 426 U.S. 736 (1976); Wolman v. Walter, 433 U.S. 229 (1977); New York v. Cathedral Academy, 434 U.S. 125 (1977); Committee for Public Education v. Regan, 444 U.S. 646 (1980); Mueller v. Allen, 463 U.S. 388 (1983); Grand Rapids School District v. Bell, 53 U.S.L.W. 5006 (U.S. July 1, 1985); Aguilar v. Felton, 53 U.S.L.W. 5013 (U.S. July 1, 1985).

the extent that such aid is therefore withheld, by command of the Establishment Clause, any consequent burden on the free excercise of petitioner's religion occurs by operation of the Constitution itself, and is therefore not subject to state "accommodation."

Finally amici contend that the Court should refrain entirely from deciding this case on the basis of federal constitutional law and, instead, remand it to the Supreme Court of Washington for a decision on state law grounds.

ARGUMENT

I.

THIS CASE SHOULD BE REMANDED FOR A DECISION ON STATE CONSTITUTIONAL GROUNDS

The Washington Supreme Court's opinion below was premised solely on the validity of the Commission's policy on federal constitutional grounds. That court stated:

> Since our State Constitution requires a far stricter separation of church and state than the federal constitution, it is unnecessary to address the constituionality of the aid under our state Constitution.

Witters v. State Commission for the Blind, 689 P.2d at 55.

Under the circumstances, this Court should not reach out to decide a difficult question of First Amendment law where a determination on state constitutional grounds is concededly available. See, e.g., Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936); Burton v. United States, 196 U.S. 283 (1905); Berea College v. Kentucky, 211 U.S. 45 (1908). Rather, this Court should remand to the Washington Supreme Court for a determination on state constitutional grounds.

There are sound jurisprudential reasons why this Court should refrain from deciding cases on federal law grounds when an adequate

independent state ground exists: Courts ought not to render advisory opinions; considerations of federalism and respect for state sovereignty should limit federal court intervention where state concerns may be resolved under state law; state constitutions can typically be amended with much greater ease than the federal charter, but if state courts are not encouraged to assume responsibility for interpreting and applying state law, these democratic processes at the state level are frustrated; and the Court's burdened docket may be relieved. See Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491 (1984) (Utter, J., is author of the dissenting opinion in Witters below).

That rule of prudence is not diminished by this Court's recent decision in Michigan

v. Long, 463 U.S. 1032 (1983). There, the Court determined that:

> when . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed federal law required it to do so.

Id. at 1040-41 (emphasis added).

Michigan v. Long created a presumption that cases involving both state and federal claims should be deemed to have been resolved on federal grounds only when it is unclear whether an adequate and independent state law ground existed. It is critical to the Long decision, we believe, that there was no basis -- either in the text of Michigan law or in readily available precedent --

to think that Michigan's guarantee against unreasonable search and siezure would be interpreted any differently than the comparable federal protection. That is not so in this case.

Here, the Washington State Constitution specifically pertains to the facts of this case: "No public money ... shall be appropriated for ... any religious ... instruction. ..."[3] And furthermore, the Washington Supreme Court has unambiguously interpreted the Washington Constitution to require a stricter separation between church and state than the First Amendment. 689 P.2d at 55.

State law is thus an adequate and independent ground for resolving petitioner's claim.[4] Accordingly, the exercise of federal jurisdiction is inappropriate here. This case should therefore be remanded to the Washington state courts for resolution of the state constitutional issue.

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[3] The Washington State Constitution provides:

> Religious Freedom. . . . No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment. . . . Article 1, §11.
>
> Sectarian Control Or Influence Prohibited. All schools maintained or supported wholly or in part by public funds shall be forever free from sectarian control or influence. Article 9, §4.

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[4] Of course, if petioner had a viable federal Free Exercise claim, certiorari might be appropriate to assure that the application of state law did not infringe on that federal right. Here, however, petitioner's Free Excercise argument is without merit (see discussion infra), was thoroughly rejected below (689 P.2d at 57) and does not warrant plenary review by this Court. Therefore, the writ should be vacated as improvidently granted.

II.

THE DENIAL OF GOVERNMENT FINANCIAL VOCATIONAL ASSISTANCE TO A PERSON STUDYING FOR THE MINISTRY IS COMPELLED BY THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

The petitioner was denied government financial benefits, otherwise available to all medically qualified applicants (which Witters concededly was) solely because he was studying for the ministry.[5] The Commission denied those benefits based on its policy forbidding the use of public funds "to assist [an individual] in the pursuit of ...[a] career or degree in theology or related areas." (Sup. Ct. Conclusions of Law, No. 7; Pet. App., at C-7). Although the statute under which the petitioner claims entitlement is facially neutral, the Commission policy was adopted to prevent the unconstitutional sectarian use of state funds.

Clearly, that policy would have been violated by state payment for the education of a minister at a bible college, under the auspices of a public vocational training program. The state's refusal to use state monies to fund religious activities is consistent with the historic purposes of the First Amendment as understood by the Framers and interpreted by recent decisions of this Court.

[5] This is not a case where the applicant was denied financial assistance merely because he was going to a religious school, out of concern that such financial assistance might indirectly benefit the religious institution even though the applicant was engaged in secular study. See e.g. Board of Education v. Allen, 392 U.S. 236 (1968). Here petitioner concedes that he was going to Inland Bible School for the sole purpose of "studying to become a pastor, missionary or Christian youth director." Pet. Br. at 3.

A. The History and Purpose of the First Amendment Prohibit State Funding of Religious, Training.

The drafters of the Constitution and Bill of Rights envisioned a secular government and provided a guarantee for such government in the First Amendment. This Court has frequently relied on the views of the founding fathers in interpreting the religion clauses. The wisdom and foresight of men such as James Madison and Thomas Jefferson may again offer guidance in determining the issue presented here.

On several occasions this Court has recognized that the religion clauses of the First Amendment had the same objectives, and were intended to provide the same protections of religious liberty, as the Virginia Statute of Religious Liberty which marked an end to the struggle against religious establishment in Virginia. Everson v. Board of Education, 330 U.S. 1, 13 (1947); Davis v. Beason, 133

U.S. 333, 342 (1890); Reynolds v. United States, 98 U.S. 145, 164 (1878). That statute, written by Thomas Jefferson and sponsored in the Virginia Legislature by James Madison, provided in part "that no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever...." Blau, Cornerstones of American Religious Freedom in America, at 78 (1949) (the statute is reproduced in its entirety, beginning at page 77) (emphasis added). The events which led to the eventual adoption of the statute in Virginia provide evidence that its language, and that of the Establishment Clause, mandate that no public funds be used for the support of any ministry.

Prior to the Revolution, Virginia empowered Anglican vestries to levy taxes for ministers' salaries and upkeep of the church. Pfeffer, Church, State & Freedom, 95

(1967). In about 1763 the Baptists, who were the chief victims of religious establishment, petitioned the government "that the church establishment should be abolished and religion left to stand on its own merits." Id. After the Declaration of Independence and the adoption of a state bill of rights, pressure from Baptists, Presbytarians and Lutherans alike finally resulted in the disestablishment of the Anglican Church.

A disestablishment law was passed in 1779, but was followed in 1784 by the Bill Establishing a Provision for Teachers of the Christian Religion (reproduced in its entirety in Everson, supra at 72). The Bill proposed to promote education by levying a tax on each citizen for the support of his declared religion. Proponents of the Bill contended that such aid to religion did not constitute "establishment": the Bill was nonpreferential among Christian sects; it

left the choice of support of any religion to the individual taxpayer; and it was proposed under the welfare power to encourage education.[6]

Both James Madison and Thomas Jefferson were as staunch in their opposition to general and nondiscriminatory support of religion as they were in their opposition to the particular support of any one religion. See Brant, James Madison, The Virginia Revolutionist Ch. 12 (1941); Pfeffer, Church, State and Freedom, supra at 101. Madison condemned the proposed Virginia Bill as a "melancholy mark of . . . sudden degeneracy" from the principle of religious freedom so recently fought for and won. Everson, supra at 68. His opposition to the bill is

[6] These are some of the very arguments petitioner raises in support of the expenditure of taxpayer monies for his training in the ministry.

embodied in his Memorial and Remonstrance Against Religious Assessments (reproduced in its entirety in Everson, supra at 63).

Similary, Jefferson stated in his Bill for Establishing Religious Freedom that:

> It is sinful and tyrannical to compel a man to furnish contributions to the propogation of opinions which he disbelieves and abhors; and it is also wrong to force him to support this or that teacher of his own religious persuasion.

Pfeffer, supra at 101.

In the minds of Jefferson and Madison, the constitutional offensiveness of the Assessment bill was not mitigated by the fact that it left to the individual the selection of the religious instituion to receive the monies:

> The same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.

Everson, supra at 65-66.

Finally, the proposition that the Bill was an appropriate exercise of the welfare power because it encouraged education, did not make it any less a religious establishment, as that term was contemplated by Madison. In the last point of the Memorial, Madison argues that if the legislature may infringe on a natural right in the area of religion, justifying it as being in the public interest, then it may likewise infringe on freedom of the press or abolish trial by jury or even sweep away all fundamental rights by invoking the same putative interest. Everson, supra at 71.

The Memorial engendered enough popular opposition to the Assessment Bill to bring about its speedy defeat in 1785. Madison then took the opportunity to introduce Jefferson's Bill Establishing Religious Freedom which won passage. Pfeffer, supra at

101. Madison drew upon his experiences with Virginia's religious legislation in drafting the First Amendment.

Further evidence that the First Amendment religion clauses are not limited merely to preferential establishment may be gleaned from the proceedings in the Senate during its drafting. The Senate had two occasions to limit the bar to preferential establishment only, and refused both times. Journal of Proceedings of the First Session of the United States Senate, at 63-67 (Aug.25 and Sept. 3, 1791); Pfeffer, supra at 141.

It is clear that the issue before the Court in the present case was contemplated and resolved by the Framers at the time our fundamental freedoms were fixed in the Bill of Rights. They well understood that the training of those aspiring to the ministry is a distinctly religious activity which becomes an "establishment of religion" when funded with public monies.

It would be inconsistent with the ideals of the Framers to allow the State to support petitioner's pursuit of a religious career with public funds. The same constitutional guarantee which assures petitioner's freedom to become a minister, forbids any agency of the state to aid him in securing the religious instruction he seeks.

B. State Funding For Training of a Minister Would Have A Primary Religious Effect in Violation Of The Establishment Clause.

In recent times, this Court has defined the meaning of the Establishment Clause in a succession of cases beginning with Everson v. Board of Education, 330 U.S. 1 (1947). In Everson the Court held:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church . . . No tax in any amount, large or small, can be levied to support any religious ativities or institutions, whatever they

> may be called, or whatever form they may adopt to teach or practice religion."

Id. at 15-16. The use of Washington State tax levies to support a student's preparation for the ministry at a religious institution -- Inland Empire the School of the Bible -- clearly falls within the prohibition set out in Everson.

In Lemon v. Kurtzman, 403 U.S 602 (1971), this Court articulated a three-pronged test for determining the constitutional validity of state action under the Establishment Clause. The continuing vitality of the Lemon test was re-affirmed most recently by this Court in Grand Rapids School District v. Ball, 53 U.S.L.W. 5006 (U.S. July 1, 1985). See also, Aguilar v. Felton, 53 U.S.L.W. 5013 (U.S. July 1, 1985); Thornton v. Caldor, 53 U.S.L.W. 4853 (U.S. June 26, 1985). The principal focus of inquiry in this case is properly the second

prong of the Lemon test, which looks to the primary effect of the state's policy.

1. The Government Financial Assistance Sought by Petitioner Would Be A Direct and Substantial Aid to Religion

The Washington Supreme Court properly held that, in determining whether a state funded program offends the Establishment Clause, it is necessary to consider the application of that program to the specific facts of the case at bar. Indeed, the Washington Supreme Court adopted this Court's analysis of "primary effect" set out in Hunt v. McNair, 413 U.S. 734 (1973):

> To identify "primary effect," we narrow our focus from the statute as a whole to the only transaction presently before us.

Id. at 742.

This Court has examined many government funding programs and has concluded that even where they may be facially neutral, if the

primary effect is the advancement of religion in their application, they will be held unconstitutional. In these cases, the Court customarily finds constitutional violations where the state aid to a sectarian institution is of a direct, as opposed to an indirect, nature.

The most recent example of this pattern is found in the Court's decision in Grand Rapids, supra. The Michigan program provided publicly funded classes for nonpublic school students in classrooms located in, and leased from, local nonpublic schools. This Court held that these programs violated the Establishment Clause of the First Amendment, distinguishing two categories of state aid to religious schools. While recognizing that certain types of support could be deemed to confer only "an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions," 53 U.S.L.W. at 5011, this Court held:

> In the second category of cases, the Court has relied on the Establishment Clause prohibition of forms of aid that provide "direct and substantial advancement of the sectarian enterprise." Wolman v. Walter [433 U.S. 229 (1977)]. In such "direct aid" cases, the government, although acting for a secular purpose, has done so by directly supporting a religious institution.
>
> . . . .
>
> This kind of direct aid to the educational function of the religious school is indistinguishable from the provision of a direct cash subsidy to the religious school that is most clearly prohibited under the Establishment Clause.

Id. at 5011-12. See also, Meek v. Pittinger, 421 U.S. 349 (1975) (direct loan of instructional materials to private institutions unconstitutional); Committeee for Public Education v. Nyquist, 413 U.S. 756 (1973) (reimbursement for teacher-prepared tests unconstitutinal); Lemon v. Kurtzman, supra

(salary supplements for nonpublic school teachers unconstitutional).

This Court has identified several factors to be utilized in determining whether the provision of state monies to sectarian institutions constitutes direct or indirect aid to religion. These include the purpose for which the state aid is granted, the nature of the benefits provided, and the identity of the recipient of the funds (i.e., student or institution). For instance, in Board of Education v. Allen, supra, the Court recognized that sectarian schools can provide secular education. It upheld a state program of lending secular textbooks to all school children, including those in parochial schools, because the program furthered secular, and not religious, education. The Court found that the program merely provided neutral welfare benefits to all children. See also, Everson v. Board of Education,

supra (state payment of transportation cost for all school children permissible). Thus, when state aid is paid directly to students for a secular purpose, a neutral state program has been upheld, even where a religious institution may be an indirect beneficiary. Allen, supra.

This Court has also approved direct aid to religious institutions of higher education themselves, rather than only to their students, where the aid was provided for an exclusively secular purpose, and was available to both sectarian and non-sectarian institutions alike. Thus, in Hunt v. McNair, 413 U.S. 734 (1973), this Court upheld a state program under which state revenue bonds were issued for purposes of a construction project at a Baptist college. The program was approved, however, only upon finding: (1) that the program had a secular purpose in seeking to aid institutions of higher

education regardless of religious affiliation; (2) that the Baptist College's operations were not significantly oriented toward sectarian education; and (3) that the bond issuance would not have a primary effect of advancing religion because the buildings to be constructed would be used only for secular purposes. In fact, in Hunt, bond proceeds were explicitly not available if "used primarily in connection with any part of the program of a school . . . or department of divinity for any religious denomination." Id. at 736-37.

In Hunt, this Court provided explicit guidance as to how to determine whether state aid to sectarian schools has the primary effect of establishing religion:

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

Id. at 743.

This Court could not have been more clear as to the constitutionally appropriate course of action the State of Washington was required to follow when it received petitioner's request to fund his education for the ministry. In the circumstances of this case, the state could not fund his training and still maintain the neutrality required by the Establishment Clause. This direct advancement of religion was properly resisted by the state, and the State's decision was properly upheld by the Washington Supreme Court.

2. State Financing for the Training of Ministers Would Impermissibly Advance Religion

Petitioner attempts to minimize the religious nature of his request by claiming that his studies are merely vocational training, such as commonly granted by the G.I. Bill and other such programs.[7] However,

[7] Petitioner asserts that the vocational aid he seeks is constitutionally indistinguishable from the educational assistance provided by the G.I. Bill, 38 U.S.C. §1651, et seq. (1964), as well as other state grant and loan programs for higher education. Pet. Br., at 38. Obviously, however, the constitutional propriety of other educational financing programs is not in issue before this Court, and it would not be appropriate to discuss their constitutionality in the abstract.

In any event, the precedent cited by petitioner, Pet. Br. at 24-26, merely reflects that where state financial assistance programs indirectly aid a religion they may be constitutionally permissible. See e.g. Americans United for the Separation of Church and State v. Blanton, 433 F. Supp. 97 (M.D. Tenn.) aff'd, 434 U.S. 803 (1977); Durham v. McLeod, 259 S.C. 409, 192 S.E.2d 202 (1972), appeal dism'd 413 U.S. 902 (1973). However, no case has addressed the specific issue of public educational funding for the direct training of ministers.

Blanton is, however, revealing in the (Footnote cont'd.)

in fact, petitioner seeks state funding for his Christian ministerial training at a school primarily sectarian in nature.

Petitioner was not merely asking the state to fund his participation in an educational program relating only tangentially to the sectarian mission of his chosen institution; he was not seeking to obtain a chemistry or a sociology degree at a school with sectarian sponsorship. Rather, by his own admission, his ministerial

context of this case. There, the court stressed that, like the G.I. Bill, the state educational grants were made to the students and were available for any student need, including subsistence. Blanton, supra at 104. But, the same court had previously invalidated a predecessor state educational aid program in which funds were paid directly to the sectarian schools and the student was not allowed any discretion to apply the funds to nonsectarian needs. Americans United for Separation of Church and State v. Dunn, 384 F. Supp. 714 (M.D. Tenn. 1974). The Washington program before the Court is more like Dunn, than Blanton in this respect.

training at the Inland Empire School of the Bible was to be comprehensively oriented toward sectarian subjects and preparation for the ministry.

Where the provision of state aid to sectarian higher education has been upheld, this Court has based its decision upon findings that the institutions were not "pervasively sectarian" and that the aid was used for nonsectarian purposes. See, Roemer v. Maryland Public Works Board, 426 U.S. 736, 755-59 (1976). See also, Tilton v. Richardson, 403 U.S. 672 (1971); Hunt v. McNair, supra. However, it is difficult to imagine a more "pervasively sectarian" institution than the Inland Empire School of the Bible, and the state aid requested by petitioner would directly fund his very specific sectarian activity -- namely, preparation for the ministry.

Under the well established principles articulated by this Court, the Washington Supreme Court correctly found that the provision of state funds would have the primary effect of advancing religion.

III.

THE STATE DOES NOT VIOLATE PETITIONER'S RIGHT TO FREE EXERCISE OF RELIGION BY REFUSING TO PAY FOR HIS RELIGIOUS TRAINING

Public financial assistance to support petitioner's training for the ministry would so involve the government in religious affairs, and would constitute such a profound symbolic and practical interaction of government and religion, that it is necessarily prohibited by the Establishment Clause. See discussion, supra. In such circumstances, the denial of that aid is compelled by the very framework of religious liberty established in the Religion Clauses of the First Amendment as a whole, and

therefore does not violate petitioner's rights under the Free Excercise clause.

In order to sustain a Free Excercise claim in circumstances such as this case, the petitioner would have to establish that a government policy had the effect of burdening his religion. See e.g. Sherbert v. Verner, 374 U.S. 398 (1963). However, where that alleged burden on religion arises because of the mandates of the Constitution itself -- as opposed to a burden imposed by a rule or regulation the government instituted as a matter of policy choice, free of constitutional command -- then the individual's religious claim cannot take precedence. Wallace v. Jaffree, 53 U.S.L.W. 4665, 4677 (U.S. June 4, 1985) (O'Connor J., concurring); see also Thornton v. Caldor, 53 U.S.L.W. 4853 (U.S. June 25, 1985) holding that a state may not "accomodate" the free exercise of religion to the extent doing so

would constitute an establishment of religion.

This distinction may be illuminated by a comparision of this case with Sherbert, supra and Thomas v. Review Board, 450 U.S. 707 (1981).

In Thomas the individual was compelled "to choose between the exercise of a First Amendment right and participation in an otherwise available public program." 450 U.S. at 716. (The program in Sherbert had the same effect.) However, in both cases the individuals were only put to that choice because they were subject to a neutral government regulation denying unemployment compensation benefits to individuals who were voluntarily out of work for personal reasons. The state was not required to have that rule -- it was a "mere" policy choice, not compelled in any way by the Constitution. Once making its policy choice,

however, Sherbert and Thomas teach that the government may not implement its program in a way that requires a person to abandon the free exercise of religion in order to obtain its benefits. Moreover, the Court specifically held that granting the unemployment benefit to the religious applicant would not itself offend the Establishment Clause because it "does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." Sherbert, supra at 409.

In this case, however, circumstances demand a very different analysis leading to the opposite conclusion. Here, granting the government financial benefit to Witters would directly and substantially involve the government in a particular religion -- specifically, the government would be paying for the religious training of a Christian

minister, which raises constitutional problems of a different order of magnitude than the payment of religiously neutral unemployment benefits. Thus, in this case, any burden on Witters' exercise of religion arises not from the government's imposition of a discretionary policy choice, as in Sherbert and Thomas, but rather from the prohibitions of the Constitution itself. Consequently, in this case the government may not provide the benefits Witters seeks. See Wallace v. Jaffree, supra and Thornton v. Caldor, supra. As Justice Douglas commented in Sherbert:

> The fact that government cannot exact from me a surrender of one iota of my religious scruples, does not, of course, mean that I can demand of government a sum of money, the better to exercise them.

374 U.S. at 412.

Furthermore, this Court has already considered and rejected the Free Excercise

claim that Witters offers here. In Committee for Public Education v. Nyquist, supra, the government sought, among other things, to provide direct tuition grants to low-income parents sending their children to private religious schools. In holding that the plan was an unconstitutional violation of the Establishment Clause, the Court also rejected the Free Excercise claim that, without the aid, poor people effectively lose their right to give their children a religious education:

> It is true, of course, that this Court has long recognized and maintained the right to choose nonpublic over public education....It is also true that a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause....In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one "advancing" religion. However great our sympathy...for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of "conscience and discipline" and notwithstanding the "high social importance" of the State's purposes...neither may justify an eroding of the limitations of the Establishment Clause now firmly emplanted.

Id. at 788-89 (citations omitted).

The same may be said of Witters: he has an absolute right to study for the ministry, and a law prohibiting him from doing so would certainly offend the Free Excercise Clause. But, notwithstanding the social importance of vocational training for the handicapped, paying for Witters training in the ministry would be an intolerable involvement of government and religion in violation of the limitations of the Establishment Clause. Such payments are not, therefore, permissible.

Petitioner attempts to avoid that conclusion by relying on McDaniel v. Paty,

435 U.S. 618 (1978) and Widmar v. Vincent, 454 U.S. 263 (1981). Neither furthers his Free Excercise claim.

In McDaniel, a Tennessee statute prevented ministers from holding public office. By requiring a person to choose between being a minister, a protected First Amendment right, and seeking public office, the state effectively "conditioned the exercise of one [right] on the surrender of the other." McDaniel v. Paty, supra at 626. However, the Court specifically considered whether precluding ministers from holding public office was required by the Establishment Clause and concluded that, in light of history and practice, Tennessee had not established that it was. 435 U.S. at 628-29. Therefore, as in Sherbert and Thomas, the state statute was not constitutionally compelled and amounted to no more than a discretionary policy which had to

give way to a real burden on the free excercise of religion. As in Nyquist, supra, a different result would follow if the state law were based on a constitutional mandate.

Petitioner also cites Widmar v. Vincent, 454 U.S. 263 (1981) in support of his argument that the state is unconstitutionally exempting him from public assistance in violation of his free exercise rights.

Of course, Widmar was a free speech, not a free exercise case,[8] and in that sense

[8] Petitioner claims that in Widmar "This Court held that it was a violation of the Free Exercise Clause to treat religious student groups disparately solely on the religious content of their speech." (Pet. Br., at 46-47). Petitioner is mistaken; this Court explicitly refused to decide the case on free exercise grounds:

> Respondant's claim also implicates First Amendment rights of speech and association, and it is on the basis of speech and association rights that we decide the case. Accordingly, we need not inquire into the extent, if any, to which free exercise

(Footnote cont'd.)

Witters' reliance is misplaced. In addition, however, Widmar does not strengthen the petitioner's position because the Court there specifically concluded that the religious speech in question had to be permitted only because to do so would not violate the Establishment Clause. Id. at 270-75.[9]

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interests are infringed by the challenged University regulation." 454 U.S. at 273, n.13 (emphasis added).

[9] In Widmar the Establishment Clause was not offended because the "benefit" to religion in that case -- providing a place for a religious club to meet -- was not substantial: there was no outright cash grant of any sort, and though the specific activity -- the meeting -- was religious, the setting was thoroughly secular.

The conclusion that the Establishment Clause was not offended in Widmar is entirely consistent with amici's contention that it would be violated if the public funding requested in this case were permitted. Here, the government benefit in question is an outright cash grant, and that money will be spent for tuition in a Bible College so that Witters can train for the ministry. The resulting aid to religion would be compound and substantial, and would therefore violate Establishment Clause limitations.
(Footnote cont'd.)

Indeed, the Court recognized that compliance with the Establishment Cluase would be a compelling justification for a content based limitation on religious speech. Id. at 271.[10]

By analogy, in this case the petitioner's vocational assistance is permissible only to the extent it is not prohibited by the Constitution. Obviously, if he were studying math at a secular school there would be no problem. And even if he

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[10] This Court has repeatedly held that, when religious speech violates the Establishment Clause, it may be prohibited consistently with the Free Speech Clause. For example, when a teacher stands up in front of a public school class and reads the Bible the teacher is engaged in religious speech; but that speech is constitutionally prohibited because the teacher is acting with the authority of the state and therefore the speech violates the Establishment Clause. Abington School District v. Schempp, 374 U.S. 203 (1963). See also Br. of ACLU, et al. as Amici Curiae in Bender v. Williamsport Area School District, No. 84-773.

were studying math at a sectarian school, this Court might find no Establishment Clause problem, see e.g. Board of Education v. Allen, supra. However, here Witters seeks vocational assistance to study for the ministry in a Bible school. In such circumstances, the effect of the financial grant would be directly, substantially and unquestionably to advance religion, and it would therefore violate the Establishment Clause. Therefore, it is not permissible even in the face of petitioner's Free Exercise claim.

CONCLUSION

For the above reasons, amici respectfully request that the case be remanded to the Washington Supreme Court for a determination under state law or, alternatively, that the decision of the Washington Supreme Court be affirmed.

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